

## 10 WAYS TO MAKE A DIFFERENCE

1. Educate legislators about the foundation
2. Educate legislators and the public about issues
3. Communicate with legislators about issues affecting the foundation's rights and duties
4. Influence regulatory bodies
5. Participate in litigation
6. Communicate with government officials about jointly funded projects
7. Respond to a written request for technical assistance from a legislative body
8. Produce nonpartisan analysis or research
9. Support advocacy through grantmaking
10. Encourage civic participation

# Top 10 Ways Private Foundations Can Influence Public Policy

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## Private Foundations May Advocate!

Private foundations may participate in the advocacy arena. Although they incur a prohibitive tax on any lobbying expenditures, lobbying is only one type of advocacy. **There are many types of non-lobbying advocacy in which private foundations may legally engage.**

There are two types of lobbying—direct and grassroots. **Direct lobbying** is a communication with a legislator (federal, state, or local) or legislative staff member that refers to specific legislation and takes a position on that legislation. **Grassroots lobbying** is a communication with the public that refers to specific legislation, reflects a view of that legislation, and contains a call to action.

Private foundations may engage in any activity that does not qualify as lobbying. Therefore, while they incur a tax on expenditures for direct and grassroots lobbying, they may engage in:

### Advocacy that falls outside of lobbying definitions, including

- Discussing broad issues, without mentioning specific legislation
- Litigation, either by signing on to *amicus* briefs or filing suit to challenge a law or enforcement of the law
- Advocacy before special purpose boards (e.g., school boards, planning commissions)
- Building relationships with legislators and helping grantees build and sustain relationships
- Training grantees how to lobby
- Convening nonprofits and decision-makers to discuss broad issues
- Educating legislators about broad issues
- Conducting public education campaigns that do not include calls to action or mention of specific legislation
- Regulatory efforts

### Advocacy that meets one of the specific lobbying exceptions

- Technical advice or assistance
- Nonpartisan analysis, study, or research
- Self-defense lobbying
- Discussions of broad social, economic, or other issues

See *Investing in Change: A Funder's Guide to Supporting Advocacy* for more detailed discussions of the rules, including the definition of lobbying and descriptions of the activities described above.

Note: This handout provides general guidelines only, and is intended to serve as an overview. Because the application of law is fact-sensitive and context is critical, it should not be relied upon as legal advice.

# WHAT IS LOBBYING?

Having reviewed ten specific permissible activities, it may be helpful to get a clear picture of what is not permissible: lobbying. The federal Tax Code divides lobbying into two types: **direct lobbying** and **grassroots lobbying**.

**Direct lobbying:** Direct lobbying is communication (e.g., letter, e-mail, phone call, personal visit) with a legislator or legislative employee that reflects a view about specific legislation. Specific legislation includes bills that are introduced as well as legislative proposals. Direct lobbying also includes communication with other government officials if

1. Those government officials participate in formulation of legislation
2. The principal purpose of the communication is to influence legislation
3. The organization expresses a view about the legislation

Direct lobbying is *not* permissible for private foundations.

**Example:** An organization calls its U.S. senator and encourages the senator to oppose a budget bill that cuts funding for education. The phone call would be direct lobbying and therefore *not* permissible for private foundations.

Because the public—not the legislature—is the decisionmaking body on ballot measures and referenda, direct lobbying also includes communications with the general public that reflect a view about ballot measures or referenda.

**Example:** An organization writes an opinion piece for the local newspaper stating that it would be beneficial to the community to pass a referendum increasing the county taxes to boost funding for education. Because the issue will be decided by the public, such an op-ed would be direct lobbying and therefore *not* permissible for private foundations.

**Grassroots lobbying:** Generally, grassroots lobbying, which is prohibited, is communication that encourages members of the public to contact their legislators about a piece of legislation. Specifically, it is a communication with the general public reflecting a view about specific legislation that encourages the public to act with respect to the legislation through a specific call to action. A call to action can be any one of the following:

1. Telling the recipient to contact a legislator or legislative employee or telling the recipient to contact another government official who participates in the formulation of legislation for the principal purpose of influencing legislation
2. Stating the address, telephone number, and/or e-mail address of a legislator or legislative employee

# Top Ten Ways

3. Providing a mechanism such as a petition or tear-off postcard for the recipient to communicate with a legislator or legislative employee or to communicate with another government official who participates in the formulation of legislation for the principal purpose of influencing legislation
4. Identifying one or more legislators who
  - ❖ Will vote on the legislation
  - ❖ Oppose the communication's view on the legislation
  - ❖ Are undecided on the legislation
  - ❖ Are the representatives in the legislature of the recipient of the communication
  - ❖ Are members of the committee or subcommittee that will consider the legislation

**Example:** An organization places an advertisement in a local newspaper indicating that it would be beneficial for the state legislature to raise state taxes to support education and tells readers, "Contact your state legislators and tell them to vote yes to the increase in taxes." This communication would be grassroots lobbying and therefore *not* permissible for private foundations.

A communication with the general public reflecting a view about specific legislation is *not* lobbying if it does not contain at least one of the above calls to action.

**Example:** An organization places an advertisement in a local newspaper indicating that it would be beneficial for the state legislature to raise state taxes to support education. If no call to action is included, the advertisement generally will not be a lobbying communication and therefore would be *permissible* for a private foundation.

As you can see, there are a lot of communications that can occur with the public or legislators to provide education on issue areas without crossing the line into lobbying activity. The following chart is designed to help illustrate the elements that must be present for a communication to be lobbying.

## Family Foundations & Advocacy

Family foundations are 501(c)(3) organizations that are classified as private foundations.

### **Family Foundations May Engage in Advocacy**

Family foundations may participate in the advocacy arena. Although they incur a prohibitive tax on lobbying expenditures, lobbying is only one type of advocacy. Lobbying includes communicating with legislators and their staff to express a view on specific legislation (direct lobbying) and encouraging others to contact their legislators to express a view about specific legislation (grassroots lobbying).

Family foundations may engage in any activity that does not qualify as lobbying. For example, it is not lobbying to meet with legislators to educate them about a broad social problem like air pollution, as long as you do not express a preference for a specific legislative proposal to address the problem, such as legislation on car emissions.

### **Family Foundations May Fund Public Charities That Lobby**

Family foundations may support public charities that lobby, but they must follow specific rules. Most importantly, the grant may not be “earmarked” for lobbying, as earmarked funds create a taxable expenditure for the foundation. A grant is considered earmarked for lobbying if it is conditioned upon an oral or written agreement that the grant be used for lobbying purposes. The prohibition on earmarking does not mean that family foundations must require grantees to refrain from using grant funds for lobbying; in fact, a grant agreement that forbids use of the funds for lobbying is unnecessarily restrictive.

Under federal tax law, family foundations may make two types of grants that avoid creating taxable expenditures – general support and specific project grants – while permitting grantees flexibility in the use of their funds. A general support grant is not earmarked for a particular purpose and specifically is not earmarked to be used in an attempt to influence legislation. The public charity may use the grant funds for any purpose, including lobbying. If the grantee uses the money for lobbying, the family foundation will not incur a taxable expenditure.

Family foundations may also fund specific projects, even those that include lobbying. When making a specific project grant, the family foundation must review the grantee’s project budget and may give a grant in an amount up to the non-lobbying portion of the budget. The public charity must use the grant funds only for the specific project. If these conditions are met, the family foundation will not incur a taxable expenditure, even if the grantee subsequently uses some of the grant money for lobbying under the designated project.

### **Family Foundations May Support Election-Related Activities**

Family foundations, like all 501(c)(3) organizations, are absolutely prohibited from engaging in activity that supports or opposes a candidate for public office; however, they can support or engage in nonpartisan activities, such as voter education, candidate education, and get-out-the-vote activities. Family foundations may also fund voter registration activities, but additional restrictions apply.

### **Trustees and Staff of Family Foundations May Engage in Advocacy Activities**

People associated with foundations do not lose their rights as individuals to participate in the policy process. In your individual capacity, you may speak with elected representatives about issues that are important to you, but it is important to separate this individual advocacy from activities you undertake on behalf of the foundation.

For more information on these rules, see *Investing in Change: A Funder’s Guide to Supporting Advocacy*.

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## Legislative Visits by Private Foundations

Although private foundations generally *may not lobby*, there are still many ways for foundation board and staff members to share information on policy issues with policymakers such as:

- elected legislators at the federal, state and local levels
- legislative staff
- executive-branch officials in a position to influence legislation

### What is lobbying?

Lobbying is an attempt to influence public officials in support of, or in opposition to, legislative proposals. Lobbying includes communicating with legislators and their staff directly and encouraging others to contact their legislators. For example, it is not lobbying to meet with legislators to educate them about a broad social problem like air pollution, as long as you do not express a preference for a specific legislative proposal to address the problem, such as legislation on car emissions.

### What is not lobbying?

***Nonpartisan analysis, study, research.*** When a private foundation presents a comprehensive, accurate study or analysis of a policy issue, it is nonpartisan educational activity, not lobbying. The document should provide enough information to allow readers to draw their own conclusions about the issue, even if the report itself contains a specific conclusion. For example, a foundation might study access to healthcare by low-income children which might conclude with a recommendation for increased funding for state child health insurance.

***Proposals affecting an organization's existence and rights.*** It is not lobbying when private foundations engage in advocacy around legislation that affects the legal status of foundations. For instance, proposed legislation to change the pay-out provisions for private foundations would fall within the so-called "self defense" exception.

***Requests for technical assistance.*** Any response to written requests for assistance from government bodies is not lobbying. As an example, the president of a private foundation, in response to a written request from the chair of a legislative committee, could testify in support of a clean indoor air bill.

***Examination of broad social issues.*** Efforts by the board or staff of a foundation to discuss broad issues rather than specific legislative proposals are not considered lobbying. Examples include educating legislators about the important role foundations play in developing new models to provide health care, or the impact of a foundation's grants to promote sustainable agriculture. These are all non-lobbying communications.

### Meeting with legislators in a personal role

People associated with foundations do not lose their rights as individuals to participate in the policy process. As an individual you may speak with elected representatives about issues that are important to you, but it is important to separate this individual advocacy from activities you undertake on behalf of the foundation. For instance, setting up a meeting with your legislator on your own time, with no mention of your foundation affiliation, allows you to discuss issues as an individual constituent.

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## Legal Brief Election Year Politics

**Grantmakers can legally participate in the political process by following guidelines established by the IRS. Here are some tips.**

*by Jane C. Nober and Kelly Shipp Simone*

You cannot turn on a television or pick up a newspaper without realizing that election season is here. And the election season—particularly in a presidential election year—brings with it both opportunities and challenges for private foundations and public charities. Grantmakers can use this opportunity to increase civic involvement, provide nonpartisan information about candidates and educate candidates about important issues. The challenge for grantmakers is working within the applicable guidelines the Internal Revenue Service (IRS) has established for political activity.

### The Only Commandment

There is only one primary rule to consider on funding or engaging in political activity: *Thou shalt not engage in partisan political activity.* Section 501(c)(3) organizations, whether private foundations or public charities, such as community foundations, may not engage in any activity that supports or opposes either candidates for public office or political parties. Such support or opposition is partisan political activity. In contrast, encouraging the public to vote, educating voters about the candidates and educating candidates can all be nonpartisan activities, if they are carried out in a way that does not suggest bias for a particular candidate or party.

Who is a candidate for public office? A candidate includes any person who has declared his or her candidacy, is considering candidacy or is being offered as a possible candidate for an elective public office at the federal, state or local level. For example, candidates in races for the presidency, city council, local school boards or judicial positions are all included under this term. Appointed officials, such as federal judges or a governor's cabinet members, are not considered candidates for public office because they are not elected.

What does it mean to support or oppose a candidate? A wide range of activities, including outright monetary contributions to a campaign, endorsements or simply presenting a candidate or political party in a more favorable or unfavorable light, could be considered partisan. The IRS uses a facts and circumstances test to make the determination, weighing all the relevant factors—including the context and timing of the activity, past activities of the organization, how the activity is carried out and the messages communicated by the organization—to determine if the activity is partisan or nonpartisan.

### Permissible Nonpartisan Activities

While the general prohibition against partisan political activity is clear, the IRS has provided guidance on the ways that charitable grantmakers can conduct or support activities carried out in

a *nonpartisan* manner. When evaluating potential grants, the key consideration is whether, in light of all facts and circumstances, the activity is supporting or opposing a candidate for public office or political party.

Voter registration and get-out-the-vote activities both encourage individuals to exercise their right to vote. Public charities may support those activities so long as they are nonpartisan; private foundations must comply with additional requirements. Common features of nonpartisan activities in those areas include:

- *Nonpartisan messages are used to encourage voter participation.*

Messages such as "exercise your right to vote" indicate nonpartisan activity. However, a message suggesting a position on one particular issue, such as "It's time for a change: Vote pro-choice," indicates partisan activity.

- *Services are provided without regard to an individual's political affiliation or tendency to vote in a particular manner.*

A project that will only provide free rides to the polls to individuals who support the organization's position on a single issue, such as welfare reform or only to members of one political party, will likely be deemed partisan.

- *The project targets individuals based on a common interest, such as the environment or individuals who are historically excluded or underrepresented populations, not based on expectations of how an individual will likely vote.*

Targeting a region because the area tends to vote Republican is impermissible, but targeting a region because its voters are historically underrepresented at the polls indicates a nonpartisan effort.

Private foundations must also ensure that a grant earmarked for a voter registration project meets several additional requirements to avoid having the grant or activity classified as a taxable expenditure. In part, these requirements—found in Section 4945(f)—require voter registration activities to be carried out by a Section 501(c)(3) organization over more than one election cycle and in at least five states.

Further, private foundations may not earmark their contribution to the project for a particular location or a particular election period. To ensure that the proposed project meets these and the other requirements, private foundations may ask the potential grantee to obtain an advance ruling from the IRS stating that the project meets the 4945(f) requirements.

**Voter education** includes activities that provide information to the public about candidates, such as publishing voter guides or hosting a candidate debate. Both public charities and private foundations may support these activities if they are nonpartisan. Key indicators of nonpartisanship include:

- *The project includes all candidates for a particular office.*

All candidates for a particular race should be solicited for participation. In the case of a candidate debate in which the field of candidates is too large to afford the opportunity for a meaningful debate, the project could still be nonpartisan if the host establishes objective criteria for determining which candidates will be invited to participate.



- *The questions will address a broad range of issues.*

Inclusion of a broad range of issues is important to avoid making it appear that the organization has a preference for one candidate over another based upon the answers to a narrow set of questions.

- *The material, whether in print or in person, is presented in an unbiased manner.*

This includes ensuring that questions are unbiased, candidates are provided with equal opportunities to respond to questions and moderators (or others from the organization) do not add commentary about the candidate's responses.

**Candidate education.** A grantmaker may educate candidates or political parties about issues by providing information or discussing issues with the candidates on its own initiatives or in response to a request for information from a candidate or party. Several cautions should be taken into consideration when providing this information:

- Either offer or provide all other parties or candidates in the particular race the same materials to avoid any appearance of partisanship.
- If the material provided expresses a view on specific legislation, be cautious if providing the material to a candidate who is an incumbent. This is an area where the rules for political activity and lobbying intersect and the rules for lobbying applicable to the grantmaker should be consulted (see "Resources," below).
- Do not develop new materials in response to a request from a candidate or party. This could be viewed as supporting the party or candidate who requested the new material.
- Carefully consider whether to ask a candidate or party to pledge support for the grantmaker's position on an issue. Publicizing which candidates or parties pledged to support the grantmaker's position could be seen as support for those who make the pledge.

Typically, educational material that either does not reference legislation or that presents enough information on all sides of an issue for a reasonable person to reach his or her own conclusions is the ideal material to share.

## **Final Notes**

While the rules governing lobbying activity are beyond the scope of this article (see "Resources," especially "What the Law Allows" for a further discussion of the lobbying rules for grantmakers), grantmakers should know that they are not required to be silent on policy issues on which they regularly engage solely because it is an election season.

In fact, election season is often a time when the public and policymakers take an increased interest in issues of concern to foundations or grantees. Grantmakers should look for the intersections of the rules for lobbying and political activity when the foundation seeks to engage incumbents or the general public on matters of public policy—particularly when expressing a view on pending or proposed legislation—or supporting projects that involve such advocacy.

Furthermore, foundation employees and board members in their individual capacities are not barred from engaging in partisan political activity and even running for office themselves solely because of their affiliation with the foundation. The key to keep in mind is that individuals should make it clear that they are not representing the foundation and that foundation resources, such as postage, telephone, photocopiers, e-mail or office space are not used for this individual partisan activity.

Finally, while this article has highlighted some important aspects of the law on political activity, it is no substitute for a knowledgeable lawyer who is familiar with your foundation's activities.

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## **Resources**

### **Council on Foundations Information**

John A. Edie, *Foundations and Lobbying: Safe Ways to Affect Public Policy* (Washington, DC: Council on Foundations, 1991). To order, call 888/239-5221 or visit [www.cof.org](http://www.cof.org) and click on "Publications." Order #702, \$20, nonmembers \$30.

Thomas A. Troyer and Robert A. Boisture, "What the Law Allows." Legal Brief, *Foundation News & Commentary*, May/June 1997, online at [www.foundationnews.org/CME/article.cfm?ID=2454](http://www.foundationnews.org/CME/article.cfm?ID=2454).

### **IRS Guidance**

Judith E. Kindell and John Francis Reilly, "Election Year Issues" in FY 2002 Continuing Professional Education material. Internal Revenue Service. Online at [www.irs.gov/pub/irs-tege/topici02.pdf](http://www.irs.gov/pub/irs-tege/topici02.pdf).

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### **Election Activities of Individuals Associated with Foundations**

*The prohibition on partisan political campaign activity does not apply to the activities of officers, directors, or employees of public or private foundations acting in their individual capacity. Foundation staff may work on political campaigns outside work hours, or using their available leave time; however, foundation leaders, staff and volunteers may not use the facilities, equipment, personnel, or other foundation resources to provide support to or oppose a candidate or campaign.*

Below are examples of instances when the actions of board members, officers, or employees can be seen as actions on behalf of the foundation in a political campaign:

1. The director of a foundation makes statements biased for or against candidates for public office during an event sponsored by the foundation or in any of its publications.
2. An employee of a foundation wears a political button at a public event or function when acting on behalf of the foundation.
3. An employee gives the foundation's mailing list to a candidate.
4. A foundation permits a candidate to use the foundation's office for a phone bank without charge.
5. A board of directors thanks its executive director for her work on behalf of a candidate.

A foundation can help to protect itself from violating these laws by:

1. Requiring officers or employees acting as individuals engaged in partisan political activity to clearly state that they are acting in their individual capacity, not on behalf of the foundation, and that any reference to their affiliation with the foundation be made for identification purposes only.
2. Notifying employees of the limitations on their use of staff time and office facilities. Time sheets should reflect that employees took leave to participate in partisan activity.
3. Disavowing any partisan actions of officials or employees that appear to be authorized by the foundation and taking steps to ensure that such actions are not repeated. Disavowals should be in writing and done in a timely manner.

7/2/04

This handout provides general guidance only, and should not be relied upon as legal advice.

# Top 10 Ways Private Foundations Can Influence Public Policy

## Supplemental Resources

### Lobbying Rules and Supporting Advocacy

*Build Your Advocacy Grantmaking: Advocacy Evaluation Tool & Advocacy Capacity Assessment Tool.* Alliance for Justice, 2005.

*Investing in Change: A Funder's Guide to Supporting Advocacy.* Alliance for Justice, 2004.

*The Private Foundation's Guide to the California Initiative Process.* Northern California Grantmakers, 2003. Available at [http://www.ncg.org/assets/NCG\\_Private\\_Foundation\\_Guide.pdf](http://www.ncg.org/assets/NCG_Private_Foundation_Guide.pdf).

Arons, David, ed. *Power in Policy: A Funder's Guide to Advocacy and Civic Participation.* Fieldstone Alliance, 2006.

Kindell, Judith E., and John Francis Reilly. "Lobbying Issues." *IRS Exempt Organizations Technical Instruction Program for FY 1997.* Available at <http://www.irs.gov/pub/irs-tege/eotopic97.pdf>.

Proscio, Tony. *Advocacy Funding: The Changing of Philanthropic Minds.* GrantCraft, 2005. Available at [www.grantcraft.org](http://www.grantcraft.org).

Simone, Kelly Shipp. *Top 10 Ways Private Foundations Can Influence Public Policy.* Council on Foundations, 2007.

### Civic Participation

Kindell, Judith E., and John Francis Reilly. "Election Year Issues." *IRS Exempt Organizations Technical Instruction Program for FY 2002.* Available at <http://www.ors.gov/pub/te-ge/eotopici02.pdf>.

Simone, Kelly Shipp, and Jane C. Nober. "Election Year Politics." *Foundation News & Commentary* 45, no. 4 (July/August 2004).

Troyer, Thomas A., Douglas N. Varley, and Vivian L. Cavalieri. *Voter Registration, Education, and Ballot Campaigns: A Funders' Guide to Legal Issues.* Funders' Committee for Civic Participation, 2006.

## Websites

Alliance for Justice, [www.afj.org](http://www.afj.org)

Council on Foundations, [www.cof.org](http://www.cof.org)

Center for Lobbying in the Public Interest, [www.clpi.org](http://www.clpi.org)

Internal Revenue Service, [www.irs.gov/charities/index.html](http://www.irs.gov/charities/index.html)

Northern California Grantmakers, Public Policy Toolkit,  
[http://www.ncg.org/services\\_policy.html](http://www.ncg.org/services_policy.html)